Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
SBC's and VarTec's Petitions for	)	**WC Docket No. 05-276**
Declaratory Ruling Regarding the	)	
Application of Access Charges to	)	
IP-Transported Traffic	)	

REPLY COMMENTS OF GLOBAL CROSSING TELECOMMUNICATIONS, INC.

Michael J. Shortley, III

Attorney for Global Crossing
Telecommunications, Inc.

1080 Pittsford-Victor Road
Pittsford, New York 14534
Tel: 585.255.1429
Fax: 585.381.6781

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2. The ILECs' legal theories as to why they may attempt to extort terminating access charges from entities other than terminating IXCs are also wrong.

A. The *AT&T Order* does not stand for the proposition that multiple parties may be liable for terminating access charges on a single call.

B. Contrary to SBC's claim, joint and several liability is not a feature of tariff enforcement.

C. Tort law theories do not support the ILECs' assertions that they may recover terminating access charges from entities other than the terminating IXC.

D. Theories of agency law do not support the ILECs' attempts to recover terminating access charges from the originating IXC.

E. SBC turns the filed tariff doctrine on its head. The doctrine actually precludes ILECs from seeking to recover access charges from any entities other than their customers. SBC's interpretation of the doctrine would, moreover, sanction the very types of discrimination that SBC notes are at the heart of the doctrine.

F. The constructive ordering doctrine cannot be stretched as far as SBC claims. SBC has an identifiable customer for its terminating access services; there is no occasion to search for a "constructive customer."

3. To the extent that the Commission concludes that Unipoint (Pointone) is not providing an information service in the "IP-in-the-Middle" call flow, it must reject Unipoint's assertion that its self-styled *status* as an ESP somehow absolves it from the payment of terminating access charges where it is, in fact, the terminating IXC. The Commission should also reject Unipoint's claim that the Commission should apply any ruling in this proceeding prospectively. Here, the Commission is called upon to interpret existing law. There is nothing unfair or inequitable in applying existing law to Unipoint.

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Introduction

Global Crossing Telecommunications, Inc. ("Global Crossing") hereby submits these reply comments on SBC's and VarTec's petitions regarding the application of access charges to IP-transported traffic. The primary issue that Global Crossing addresses in this reply is whether, assuming that SBC is correct that Unipoint is an interexchange carrier ("IXC"), rather than an Enhanced Services Provider ("ESP"), which IXC -- the originating IXC or terminating IXC -- is responsible for the payment of terminating access charges. (*See* Parts I and II, *infra*). Assuming that Unipoint is an IXC, the Commission should reject Unipoint's claims that it is not liable for terminating access charges. (*See* Part III, *infra*).[1]

The petitions raise fundamental questions of interpretation of the language of the *existing* access tariffs of the incumbent local exchange carriers ("ILECs"). It is, therefore, remarkably surprising that, in the voluminous pages submitted by the ILECs, there is virtually no discussion of the language of the tariffs that necessarily control the outcome of this proceeding. The ILECs concoct elaborate theories regarding who should

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[1] However, should the Commission decide that Unipoint in fact is providing an enhanced (or information) service, the Commission must conclude that no access charges are due *at all* in the call flow posited by SBC. *See* SBC Petition at 10 (Illustration 4).

be responsible for the payment of terminating access charges in the call flows posited by SBC and VarTec, but they do not even attempt to reconcile these theories with the language of their *own access tariffs.*

This approach is inappropriate in the context of a declaratory ruling proceeding in which the Commission is called upon to "issue a declaratory ruling terminating a controversy or removing uncertainty." 47 C.F.R. § 1.2. In this proceeding, the Commission must declare what the law *is*; not what the law should be. The ILECs' interstate access tariffs are the governing law, and the Commission must interpret and enforce those tariffs as written.

Summary of Argument

1. SBC is simply wrong that it may pursue anyone it chooses to collect allegedly unpaid terminating access charges. Its interstate access tariffs (and those of the other ILECs) constitute the governing law, and those tariffs permit SBC to seek compensation *only* from its customers – the terminating interexchange carriers ("IXC").

2. The ILECs' legal theories as to why they may attempt to extort terminating access charges from entities other than terminating IXCs are also wrong.

A. The *AT&T Order* does not stand for the proposition that multiple parties may be liable for terminating access charges on a single call.

B. Contrary to SBC's claim, joint and several liability is not a feature of tariff enforcement.

C. Tort law theories do not support the ILECs' assertions that they may recover terminating access charges from entities other than the terminating IXC.

D. Theories of agency law do not support the ILECs' claims that they may recover terminating access charges from the originating IXC.

E. SBC turns the filed tariff doctrine on its head. The doctrine actually precludes ILECs from seeking to recover access charges from any entities other than their customers. SBC's interpretation of the doctrine would, moreover, sanction the very types of discrimination that SBC notes are at the heart of the doctrine.

F. The constructive ordering doctrine cannot be stretched as far as SBC claims. SBC has an identifiable customer for its terminating access services; there is no occasion to search for a "constructive customer."

3. To the extent that the Commission concludes that Unipoint (Pointone) is not providing an information service in the "IP-in-the-Middle" call flow, it must reject Unipoint's assertion that its self-styled *status* as an ESP somehow absolves it from the payment of access charges where it is, in fact, the terminating IXC. The Commission should also reject Unipoint's claim that the Commission should apply any ruling in this proceeding prospectively. Here, the Commission is called upon to interpret existing law. There is nothing unfair or inequitable in applying existing law to Unipoint.

Argument

I. UNDER THE PLAIN LANGUAGE OF THE ILEC ACCESS TARIFFS, ONLY THE TERMINATING IXC IS RESPONSIBLE FOR THE PAYMENT OF TERMINATING ACCESS CHARGES.

The Commission must look exclusively to the language of the existing ILEC access tariffs to determine which entity is responsible for the payment of terminating access charges. Under the unambiguous language of those tariffs, the ILECs must seek recovery of terminating from the terminating IXC *and from no other entity.*

A. The Commission Must Decide This Matter Exclusively on the Basis of the Language of the ILECs' Interstate Access Tariffs.

In its previously filed comments, Global Crossing addressed at length the principles of tariff interpretation and application that are dispositive here.[2] These principles are undisputed. First, "the terms of the federal tariff are to be considered 'the law' and to therefore '*conclusively and exclusively determine the rights and liabilities*' as between the carrier and its customer." *Evanns v. AT&T Corp.*, 229 F.3d 837, 840 (9th Cir, 2000). *See also MCI Telecomms. Corp. v. Garden State Inv. Corp.*, 981 F.2d 385, 387 (8th Cir. 1982) (in bringing a complaint seeking payment of unpaid charges, the carrier "must establish the *applicability and validity of a tariff*," *quoting Ivy Broadcasting Co. v. Am. Tel. & Tel. Co.*, 391 F.2d 486, 494 (2d Cir. 1968) (emphasis added). The Commission must, therefore, resolve the matters presented strictly according to the language of the tariffs. The parties' (or the Commission's) concepts of what the law should be, how the tariffs should read or what would make sound public policy are all utterly irrelevant in this context. As the Ninth Circuit has held:

> Under the filed tariff doctrine, a tariff filed with and approved by a regulating agency forms the "exclusive source" of the terms and conditions governing the provision of service of a common carrier to its customers. A filed tariff contains the force of law binding the utility and its customers and may be interpreted and enforced by a court in a breach of tariff action such as this one. Because the Independents' tariffs form the exclusive source of the obligations between the Independents and their customers, *the district court erred in analyzing the parties' obligations under FCC interpretations of the Telecommunications Act . . . without interpreting the tariffs themselves.* (Emphasis added; citations omitted).

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[2] Global Crossing at 6-13.

3 Rivers Tel. Coop. v. U.S. West Comms., Inc., 45 Fed. Appx. 698, 2002 US App. LEXIS 18196 at *3-4 (9th Cir. Aug. 27, 2002).

Second, to the extent that the Commission finds the tariffs ambiguous or unclear, it must construe the tariffs strictly against the drafter and in favor of the customer. *See Commodity News Serv., Inc. v. Western Union,* 29 FCC 1208, 1212 (1960); *Associated Press Petition for Declaratory Ruling,* 72 FCC 2d 760, 765 (1979).

Third, if the Commission wishes to order the ILECs to change their access tariffs, the Commission must follow the procedures set forth in sections 203-205 of the Act. *See, e.g., Am. Tel. & Tel. Co. v. FCC,* 487 F.2d 865, 873-75, 880-81 (2d Cir. 1971) (Commission must follow statutorily prescribed procedures for carrier-initiated rate revisions); *Am. Tel. & Tel. Co. v. FCC,* 449 F.2d 439, 450 (2d Cir. 1971) (in prescribing a carrier's rates and practices under § 205(a), the Commission must specifically find that the rate or practice is "just and reasonable").

This proceeding, of course, does not involve a tariff investigation or prescription nor is it a rulemaking proceeding. At the expense of belaboring the obvious, the Commission's duty, in this proceeding, is to interpret and enforce SBC's interstate access tariff as written.[3]

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[3] Global Crossing stresses this fundamental point, not because the Commission is unaware of it, but because the ILECs seem oblivious to it. This is not to say that the Commission should ignore the policy implications of the current regime. Indeed, this proceeding and multiple other proceedings are being spawned precisely because of the fundamentally irrational nature of the current intercarrier compensation regime. The Commission should act promptly -- in the appropriate proceeding -- to replace the existing, subsidy-ridden access charge regime with an intercarrier compensation system that promotes economic rationality.

B. Under SBC's (and Other ILECs') Access Tariffs, Only the Terminating IXC Is Responsible for the Payment of Terminating Access Charges.

SBC's interstate access tariffs (and those of the other ILECs) are clear and controlling. They precisely define who is responsible for the payment of access charges. Southwestern Bell's interstate access tariff defines a "customer" as:

> [a]ny individual, partnership, association, joint stock company, trust, corporation or any other entity which *subscribes to the services* offered under this tariff, including Interexchange Carriers (ICs) and End Users. (emphasis added)

Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, § 2.7 (emphasis added).[4]

The tariff describes an access service as establishing a "two-point communications path between a *customer's* premises and an end user's premises." *Id.*, § 6.1 (emphasis added).

As Global Crossing demonstrated in its comments (and certain parties agree, at least in part),[5] it is the terminating IXC, which connects with the local exchange carrier ("LEC"), that is the LEC's customer and that is responsible for the payment of terminating access charges in the call flow posited by SBC and VarTec.[6] The originating IXC, which is not a customer of the terminating LEC, is not responsible for any terminating access charges.[7]

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4 Global Crossing attached to its comments a compilation of the relevant portions of the access tariffs of the remaining SBC ILECs as Exhibit. The language of other ILECs' tariffs is identical or virtually identical to that contained in the SBC tariffs.

5 *See, e.g.*, Global Crossing at 10; Frontier at 3-4; Wiltel at 4-7; NASUCA at 5-6; Verizon at 2.

6 *See* SBC Petition at 10 (Illustration 4); VarTec Petition at 2-3.

7 Certain ILECs attempt to manufacture an ambiguity (which the Commission would need to resolve *against* the ILECs in any event) by noting that, in some instances, the terminating IXC does not connect directly with the ILEC, but rather routes traffic through a competitive local exchange carrier ("CLEC"), which then sends the traffic to the ILEC over local interconnection facilities. How this routing configuration creates an ambiguity

On remand in *3 Rivers Telephone Cooperative*, the District Court rejected the claims of US West (Qwest) that the *orginating* IXC was responsible for the payment of terminating access charges. To the contrary, on the basis of the plain language of access tariffs (albeit intrastate) that is virtually identical to the language of the tariffs presented here, the Court squarely held that the terminating IXC is the "customer" of the terminating LEC and, therefore, is the entity responsible for the payment of terminating access charges. *3 Rivers Tel. Coop. v. U. S. West Comms., Inc.*, 2003 US Dist. LEXIS 24871 at * 30-38 (D. Mont. 2003). The District Court's reasoning -- and that of the Ninth Circuit -- is correct and the Commission should follow that line of reasoning in disposing of the issues presented here.[8]

II. THE ILECs' PURPORTED JUSTIFICATIONS FOR ATTEMPTING TO IMPOSE ACCESS CHARGES UPSTREAM ARE INCORRECT AS A MATTER OF LAW.

The ILEC parties advance a number of theories why the Commission should hold originating IXCs (and any other parties that may strike the ILECs' fancy) liable for terminating access charges. These theories are all deficient. As discussed in Part I, *supra*, the ILECs' various rationales simply cannot be reconciled with the *language of the tariffs themselves.* The ILECs effectively want the Commission to rewrite their tariffs to define a customer along the following lines:

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in the tariff definition of "customer" or description of access services is a mystery. Moreover, even in this routing configuration, the access tariffs themselves supply the answer. The terminating IXC is purchasing jointly-provided access services from the two LECs in question. *See, e.g., Southwestern Bell Telephone Company,* Tariff F.C.C. No. 73, § 2.6, attached to Global Crossing's comments as Exhibit 2. In no sense does this routing configuration convert the originating IXC into a customer of the terminating LEC.

8 In its comments, Qwest resurrects its argument that the Commission's access charge rules embody a "calling party's network pays" concept. The Commission's rules, of course, say no such thing. More importantly, neither do Qwest's access tariffs. In fact, the District Court, in *3 Rivers Tel. Coop.*, rejected this very argument that Qwest raised in that proceeding. *Id.*

> [a]ny entity . . . which subscribes to the services offered under this tariff . . . [or which is a customer or an entity that subscribes to the services offered under this tariff, or that knew or should have known that the ILEC customer was evading access charges or where the ILEC customer has gone bankrupt or where the ILEC is having difficulty in getting its customer to pay or where the ILEC wishes to sue some other entity or that in the ILEC's view of sound public policy should be required to pay].

The fact remains that the ILEC tariffs do not so provide, and, in the context of this proceeding, the Commission may not rewrite them in this -- or, for that matter, any other -- manner. The ILEC tariffs, as written, resolve the matter before the Commission of which entity is required to pay terminating access charges. The answer is the terminating IXC, and no other entity.

However, even if the Commission wishes to consider these theories, they are all legally deficient. The ILECs broadly advance six such theories: (1) the *AT&T Order* held that multiple IXCs may be held liable for terminating access charges; (2) liability for access charges, as a general matter, is joint and several; (3) tort law principles support the ILECs' attempts to recover terminating access charges from multiple entities; (4) agency law principles would hold that each carrier in the call chain, including the terminating IXC, is acting as the agent of the originating IXC; (5) the filed-tariff doctrine permits ILECs to pursue multiple parties for terminating access charges; and (6) the "constructive ordering" doctrine supports imposing liability on the originating IXC. Each theory is groundless.

A. The *AT&T Order* Does Not Hold that Multiple Parties May Be Held Liable for Terminating Access Charges on a Single Call.

In the *AT&T Order*, the Commission held that:

> [W]hen a provider of IP-enabled voice services contracts with an interexchange carrier to deliver interexchange calls that begin on the [public switched telephone network], undergo no net protocol conversion, and terminate on the [public switched telephone network], the interexchange carrier is obligated to pay terminating access charges. Our analysis in this order *applies to services* that meet these criteria regardless of whether only one interexchange carrier uses IP transport or instead multiple service providers are involved in providing IP transport. (Emphasis added; footnotes omitted).

Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges, 19 FCC Rcd. 7457, 7470 (2004) ("*AT&T Order*").

SBC and the other ILECs torture this language to read it as a broad affirmation of their attempts to hold potentially each one of multiple parties responsible for terminating access charges on a single call.[9] The Commission knows full-well what it decided -- and, more importantly, what it did not decide -- in the *AT&T Order.* Suffice it to say, as Global Crossing demonstrated in its comments,[10] the Commission only decided that access charges are due on this traffic. The Commission *did not decide which IXC*, in a multiple-carrier call flow, was responsible for terminating access charges. Nor was there any reason for the Commission to reach this issue. The Commission's access charge

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[9] *See. e.g.,* SBC at 10-13; BellSouth at 9.

For its part, at least USTA candidly admits that it is requesting the Commission "to *extend liability*" to the originating IXCs. USTA at 6 (emphasis added). This, of course, the Commission may not do in this proceeding.

[10] Global Crossing at 13-16.

rules and the ILEC tariffs already supply the answer to that question.[11] The ILECs' contentions to the contrary are simply not reconcilable with the language of the *AT&T Order*.

B. Existing Law Does Not Hold Customers and Non-Customers Jointly and Severally Liable for Terminating Access Charges.

SBC advances the rather remarkable proposition that liability for access charges is joint and several.[12] *Sloss-Sheffield* stands for no such proposition. There, the shipper (Sloss-Sheffield) sought reparations for being overcharged for carriage of goods transported by multiple rail carriers. 269 U.S. at 230. The Supreme Court interpreted section 8 of the Interstate Commerce Act -- the predecessor of section 201(b) of the Communications Act. 269 U.S. at 232-33.[13] The Supreme Court held as follows:

> The cause of action sued on is *statutory in origin.* It rests primarily on § 8. . . . The Commission has held early, and has consistently

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11 SBC relies on the FCC's citation, in the *AT&T Order*, to the comments submitted by WilTel Communications Group, Inc. as support for SBC's view that the FCC actually did address which of multiple interexchange carriers is liable for access charges. *See* Letter from David L. Sieradzki, Counsel for WilTel Communications Group, Inc., to Marlene H. Dortch, Secretary, FCC, *AT&T IP Telephony Proceeding* (filed Mar. 12, 2004) ("WilTel Letter") (*see* SBC at 7-8). In fact, that filing itself undercuts SBC's position that every interexchange carrier that touches a long-distance call is jointly and severally liable for terminating access charges. Paragraph 19 of the *AT&T Order* itself and that citation to the WilTel filing simply recognize -- as does SBC -- that more than one interexchange carrier may be involved in a call. As the WilTel Letter explains in outlining various scenarios for the FCC, "two or more carriers may collaborate to perform the same functions as [AT&T's IP service]." WilTel Letter at 1. The purpose of the WilTel Letter was to urge that, howsoever the FCC might rule, its decision should take account of multiple possible scenarios, and not just where a single provider, such as AT&T, is providing an IP-in-the-middle service. Nothing in the submission addresses, and the FCC does not address, the proposition that the originating interexchange carrier should be singled out for liability.

12 SBC at 16, *citing Louisville & Nashville RR v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217, 231-34 (1925).

13 Section 8 of the Interstate Commerce Act provided that if "any common carrier . . . should do, or cause to be done, or permit to be done any act, matter or thing in this act prohibited or declared unlawful . . . such common carrier shall be liable . . . for the full amount of damages sustained in consequence of any violation of the provisions of this act."

> held since, that *carriers who by means of a joint through rate make excessive charges* are liable jointly and severally for all damages sustained. . . . The Louisville & Nashville, the initial carrier, extracted the excessive joint rates on behalf of itself and all of the connecting carriers who with it were parties to the joint through tariff.

269 U.S. at 232-34 (emphasis added; citations omitted).

Sloss-Sheffield narrowly addressed the responsibility of carriers under a provision of the Interstate Commerce Act that applied only to carriers *and not* to customers -- just like the corresponding provisions of the Communications Act. The Court held that, where multiple carriers provide a service under a joint-through rate, each carrier may be liable for damages sustained *by the customer.* That is hardly a remarkable proposition itself, but it bears no resemblance to the proposition advanced by SBC. The Supreme Court did not hold that customers and non-customers alike may be jointly and severally liable *to a carrier* for unpaid tariffed charges. Indeed, to the extent that SBC seeks to extract access charges from entities other than its access customers, the law is precisely to the contrary. *See. e.g., United Artists Payphone Corp. v. New York Tel. Co.,* 8 FCC Rcd. 5563, 5567 & n.54 (1993) (violation of section 203(c), among others, of the Act for a carrier to seek to recover charges from an entity that is not its customers); *Ascom Comms., Inc. v. Sprint Comms. Co.*, 15 FCC Rcd. 3223, 3221 (2000) (same).

SBC's common law theory of joint and several liability is groundless and the Commission should reject it.

C. Tort Law Concepts Do Not Support Imposing Terminating Access Charges on Entities Other Than the Terminating IXC.

SBC and other ILECs surface the proposition that they may hold multiple parties liable for terminating access charges on a single call under general principles of tort law. SBC sets forth its theory as follows:

> [A]t least in that circumstance -- *i.e.*, where the originating interexchange carrier is aware of objective evidence suggesting that the wholesale provider is evading access charges -- the carrier has a good faith obligation to investigate the matter and to confirm that the wholesale provider it intends to use is paying access charges.[14]

This concept runs afoul of the filed-tariff doctrine, is unsupportable as a matter of tort law (even if relevant) and makes the false assumption that access charges are equally and uniformly assessed upon all users.

First, "the rights as defined by the tariff cannot be varied or enlarged by contract or tort of the carrier." *Keogh v. Chicago & Northwestern R. Co.,* 260 U.S. 156, 163 (1922). For this reason, courts have consistently rebuffed actions -- either contract-based or tort-based -- that seek to establish liability on the part of either the carrier or the customer that have the effect of altering or varying the terms of a filed tariff. *See, e.g., Am. Tel. & Tel. Co. v. Central Office Telephone, Inc.,* 524 U.S. 214, 226-27 (1998) (tortious interference claims, among others); *Square D Co. v. Niagara Frontier Tariff Bureau,* 476 U.S. 409 (1986) (private antitrust claims excluded by operation of filed tariffs); *Hill,* 364 F.3d at 1316-17 (unjust enrichment, fraud, breach of contract, among others); *Evanns,* 229 F.3d at 840-41 (state law non-disclosure claims).

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[14] *See, e.g.,* SBC at 15; *see also* BellSouth at 2, 16 n.37; Frontier at 5.

Yet, that is precisely what SBC seeks to do here. Its interstate access tariffs are clear as to what services are provided thereunder *and to whom* and, in this respect, common law doctrines of tort law are simply inapplicable, having been overridden by a filed federal tariff. SBC is asserting that its tariffs apply to *non-customers*, thereby asking the Commission to alter or vary the terms of its tariffs. Having filed those tariffs, however, SBC is barred by the filed tariff doctrine from any recovery from parties other than its customer -- the terminating IXC -- on any tort-based theory of liability.

Second,, even were the Commission to consider SBC's tort-based claims, it would need to conclude -- as a threshold matter -- that an originating IXC owed some duty to SBC. The most that SBC appears to claim is that the originating IXC has some duty to ascertain and effectively to disclose whether the terminating IXC is somehow "evading" access charges or intends to pay access charges.[15] SBC does not identify the source of that duty (it certainly is nowhere to be found in SBC's tariffs) nor its scope.

SBC appears to be raising a "concealment" claim. However, in the absence of any fiduciary or confidential relationship between SBC and an originating IXC, there is no general duty of disclosure and therefore, no tort-law basis to impose *any* liability -- joint and several or otherwise -- upon an originating IXC. *See, e.g., Taylor v. Western Casualty & Surety Co.*, 523 S.W.2d 582, 586 (Mo. App. 1975); *Mitchell Energy Corp. v. Samson Resources Co.*, 80 F.3d 976, 985 (5th Cir. 1996) (under Texas law, absent a fiduciary or confidential relationship, failure to disclose information is not actionable as fraud); *Marketing West, Inc. v. Sanyo Fisher (USA) Corp.*, 7 Cal. Rptr. 859, 864 (Cal. Ct. App. 1992) (only limited circumstances where non-disclosure gives rise to a cause of

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[15] SBC at 15.

action in absence of fiduciary or confidential relationship). In any event, SBC has proved, in this and other proceedings, that it is more than capable of protecting its interests. If it needs to enlist the services of third parties in its efforts to do so, it should do so directly by contract, not by torturing the law governing the duties and rights of carriers.

Finally, this theory rests upon a false assumption. SBC assumes that terminating access is a single, indivisible rate that is equally applicable to all. That simply is not true. The amount of access charges that are due vary by numerous factors, such as end office connections and mileage. Thus, the concept that an originating IXC may know or have reason to know that a terminating IXC is "evading" access charges is without foundation. For a variety of reasons, the terminating IXC's costs (of which access is only one -- albeit a very large -- component) may vary dramatically from the originating IXC's own costs. SBC's theory is no more than an invitation to harassment.

D. Agency Law Principles Do Not Support ILEC Attempts To Collect Terminating Access Charges from Non-Customers.

Certain ILECs assert that the terminating IXC is no more than the agent of the originating IXC in ordering terminating access services from a LEC.[16] This assertion is groundless.

Bell South's assertion that "Unipoint and Transcom's actions as Vartec's agents in terminating this traffic are, binding, as a matter of law, on their principal, Vartec" is wrong.[17] Nothing in the common law, FCC regulations, or FCC decisions suggests that the act of contracting with another party for the delivery of a portion of a call creates an

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16 *See, e.g.*, Frontier at 5-6; BellSouth at 8-9.

17 Bell South at 9.

agency relationship. It is fundamental that before a principal can be held liable for the actions of its agents, the existence of a legal agency relationship must be established. Agency is defined as "the fiduciary relation which results form the manifestation of consent by one person to another that the other shall act on his behalf and *subject to his control*, and consent by the other so to act."[18] The fact that Unipoint and Transcom may be contractually liable to Vartec to complete a call does not automatically make them agents as a matter of law. Neither Bell South nor any other ILEC is omniscient, fully cognizant of whether Unipoint or Transcom or, indeed, any provider is, by virtue of their contracts with an originating IXC, the originating IXC's "agent," or, instead, assumes full responsibility for the call when it is handed off to them.[19] In this regard, Bell South's suggestion that the use of alternate termination providers is in some sense intended to relieve the originating IXCs of their common carrier obligations[20] is both specious and obfuscates the issue: whether the originating IXC retains common carrier obligations vis-à-vis its retail customers (it does) has no bearing on the question of whether the terminating IXC is responsible for paying access charges.

E. SBC Turns the Filed-Tariff Doctrine on Its Head.

SBC posits that the filed-tariff doctrine somehow supports its strategy of attempting to recover terminating access charges from multiple parties. In this respect, SBC relies upon no authority other than the non-discrimination policy underlying the

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18 Restatement (Second) of Agency, §1 (1) (emphasis added).

19 Indeed, the materials submitted by SBC with its petition clearly demonstrate that the terminating provider is *not* acting as an agent of its customer. *See* SBC Petition, Ex. H (AT&T/Transcom Agreement, which establishes a carrier-customer, not an agency, relationship); Ex. I (McLeod Master Services Agreement, which also does not establish an agency relationship). Frontier and BellSouth, to the contrary, provide only mere speculation and assertions, but no factual support, for their agency law claims.

20 *See* Bell South at 8.

doctrine.[22] As Global Crossing previously demonstrated, that line of reasoning misses the mark because the filed-tariff doctrine actually *precludes* the result that SBC seeks.[23] SBC may collect every penny of terminating access charges to which it is lawfully entitled from its customer -- the terminating IXC -- and thus ensure that all IXCs are charged for terminating access according to the tariffs. That result fully satisfies the non-discrimination principles (trumpeted by SBC[24]) underlying the filed-tariff doctrine, and SBC does not explain how its ability to pursue non-customers advances that goal at all.

Indeed, permitting SBC to pick and choose its victims would invite the very types of discrimination that are inimical to the doctrine. If adopted, SBC's theory would allow it to double-recover access charges and would invite SBC to choose which entities to demand payment from, thereby allowing SBC to discriminate in favor of IXCs that it prefers (*e.g.*, its own affiliated IXCs).[25] That result would hardly be consonant with the policies underlying the filed-tariff doctrine.

F. The Constructive Ordering Doctrine Does Not Permit SBC To Collect Terminating Access Charges from an Originating IXC.

SBC invokes the constructive ordering doctrine as yet another basis for attempting to justify trying to collect terminating access charges from IXCs that are not its customers.[26] The doctrine is not applicable to the facts presented in the petitions.[27]

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22 SBC at 11.

23 Global Crossing at 12-13.

24 SBC at 2-3, 13-14.

25 *See, e.g.*, Joint CLECs at 3.

26 SBC at 11-13, *citing Advamtel, LLC v. AT&T Corp.*, 118 F. Supp. 2d 680 (E.D. Va. 2000).

27 The Commission established the doctrine in *United Artists Payphone Corp., supra*, and, as that decision makes clear, an originating IXC could not be liable under this theory because it neither intentionally nor constructively "ordered" any access termination

As the District Court in *Advamtel* held, the doctrine only applies when three criteria are met: "the receiver of services: (1) is interconnected with other carriers in such a manner that it can expect to receive access services; (2) fails to take reasonable steps to prevent the receipt of access services; and (3) does in fact receive such services." *Advamtel,* 118 F. Supp. 2d at 685, *citing Access Charge Reform,* 14 FCC Rcd 14221, ¶ 188 (1999).

SBC's own Illustration 4 demonstrates the failure of SBC to meet the first of the *Advamtel* criteria. The illustration shows that no originating IXC has interconnected its network with that of SBC. If anyone has "constructively" ordered services from SBC, it is the terminating IXC that interconnects with the PSTN on the terminating end of the call in a manner that SBC believes was improper. The reason for the first criterion is clear: the "constructive ordering" doctrine has no application where there is an *actual* customer.[29] Indeed, in *Advamtel,* there was a direct connection between the access

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services from SBC. Notwithstanding SBC's attempt to recharacterize the significance of this decision (SBC at 11 n.15), the FCC squarely held that the "customer" was the entity that "ordered" the service and that the complainant (against AT&T) was not liable for disputed charges because it was not the "customer" under the tariffs. And, contrary to SBC's reading of the case, the decision does not stand for either an expansive or restrictive interpretation of the term "order," but demonstrates that the FCC "embraced" the doctrine "in the context of fraudulently placed calls . . . ." *See Capital Network Sys., Inc. v. FCC,* 28 F.3d 201, 205 (D.C. Cir. 1994) (describing *United Artists* in affirming FCC's rejection of a proposed tariff), *affirming Capital Network Systems, Inc.,* 7 FCC Rcd 8092, 8093 (1992) (holding it a "patently unreasonable practice" to "charge an entity for a service it did not order and may not have received").

[29] SBC's assertion that there is "an unbroken chain between VarTec and the terminating local exchange carrier" (SBC at 13) completely misses the point. Here, SBC is perfectly free to seek to recover the access charges it believes it has been wrongly denied from the party that interconnected with SBC, namely, the terminating IXC that may have direct or indirect connections with and, therefore, actually purchased services (albeit, allegedly the wrong services) from SBC. *See also supra* at 6-7 n.7 (discussion of jointly-provided access services).

provider and the putative customer. *See Advamtel*, 118 F. Supp. 2d at 681-82 (describing interconnections between CLECs and ILECs and AT&T; there were no intermediary carriers between the CLEC and AT&T). The concept of "interconnection" connotes a physical linking or connection of networks. The Commission itself defines "interconnection" as the "the linking of two networks for the mutual exchange of traffic." 47 C.F.R. § 51.5. The absence of such interconnection, as in the circumstances here, precludes a finding of the existence of a "constructive" customer, where there *is* an actual customer. SBC's expansive interpretation of the doctrine would result in every single carrier in the "unbroken" call chain -- including possibly even SBC itself, in its capacity as the LEC that might originate an interexchange call -- having "constructively ordered" an access service, an obviously preposterous result.

SBC's allegations fail to meet the second and third criteria of the *Advamtel* test as well. The originating IXC neither received services from SBC nor did it fail to take reasonable steps to prevent the receipt of such services from SBC. To the contrary, in the call flow posited by SBC, the originating IXC contracted with the terminating IXC *in lieu of entering into* a contractual relationship (express or implied) with SBC. Thus, it is the terminating IXC that delivered traffic into SBC territory and perhaps should have received access services from SBC.

The wide variety of legal theories advanced by the ILECs as to why they may pursue whom they please to collect terminating access charges are not only of absolutely no decisional significance in this proceeding, they are utterly without merit. The Commission should reject them.

III. CERTAIN SUGGESTIONS ADVANCED BY UNIPOINT ARE WITHOUT MERIT AND SHOULD BE REJCTED BY THE COMMISSION.

As Parts I and II of this reply make clear, Global Crossing's principal concern relates to the issue directly raised by VarTec in its petition, namely, where it is the originating IXC -- but not the terminating IXC -- in the call flow posited by SBC Illustration 4, it cannot be held liable for terminating access charges. In response to SBC's petition, Unipoint (Pointone) advances certain claims that the Commission should reject. Unipoint claims, in essence, that, because it has declared itself to be an ESP, the Commission cannot find it responsible for access charges, even where it is providing services to other IXCs on calls that both originate and terminate on the PSTN.[30] As Global Crossing noted in its comments, if the Commission concludes that Unipoint is, in fact, providing an enhanced (or information) service, no access charges would be due to SBC from *any party.*[31] However, if the Commission concludes that Unipoint does not fall within the ESP exemption in this factual circumstance, then the Commission must hold that Unipoint is liable for terminating access charges, just like any other similarly-situated terminating IXC.

First, Unipoint's self-classification as an ESP misses the point. The focus of the ESP access charge exemption is not on the provider itself, but upon the nature of the services being provided. It would hardly be unusual for the Commission to find that, in certain circumstances, or as to certain customers, a provider is offering an information service, while in other contexts, it is offering a telecommunications service. *See. e.g.,*

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30 Unipoint at 9-12.

Global Crossing observes that this position seems hard to reconcile with the *AT&T Order.*

31 Global Crossing at 3.

Southwestern Bell Tel. Co. v. FCC, 19 F.3d 1475, 1481 (D.C. Cir. 1994); *Nat'l Assn of Reg. Utils. Comm'rs v. FCC,* 533 F.2d 601, 608 (D.C. Cir. 1976). If, in fact, in the "IP-in-the-middle" call flow, the end-to-end nature of the service renders it a telecommunications service, Unipoint, as the wholesale, terminating provider would in no different position than any other terminating IXC and should be treated accordingly.

Second, contrary to Unipoint's claim,[32] it would be neither unfair nor inequitable to expect Unipoint to configure its services differently for different types of customers where those distinctions have regulatory consequences. Any carrier that provides multiple services must do so today. Finding that Unipoint should have done the same would, by no stretch of the imagination, constitute an unjust result. This may be "regulation for regulation's sake."[33] That complaint, however, goes to the nature of the current regulatory regime and may (indeed, does) justify changing that regime. It does not, however, provide a justification for the Commission to shift the burden of paying terminating access charges to an entity other than the terminating IXC.

Third, the fact that Unipoint may offer its services purely under contract would not exclude it from the definition of a "carrier."[34] Today, *no* carrier may offer interstate, interexchange services pursuant to tariff as the Commission has detariffed interstate and international interexchange services on a mandatory basis. *Policy and Rules Concerning the International, Interexchange Marketplace,* Report and Order, 16 FCC Rcd. 10647 (2001); *Policy and Rules Concerning the Interstate, Interexchange Marketplace,* Second Report and Order, 11 FCC Rcd. 20730 (1996).

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32 Unipoint at 11-12.

33 *Id.* at 11 n.7.

34 *See id.* at 17-19.

Finally, the Commission cannot accept Unipoint's offer to decide the matters presented in the petitions on a prospective basis only.[35] The Commission is called upon to declare, in this proceeding, what the law is, not what it should be. At bottom, this is simply a request that, if matters do not go well for Unipoint, the Commission shift the obligation of paying terminating access charges from Unipoint to its customers. The Commission neither may, nor should, engage in this exercise.

Conclusion

For the foregoing reasons, the Commission should act upon the SBC and VarTec petitions in the manner suggested herein and in Global Crossing's comments.

Respectfully submitted,

/s/ Michael J. Shortley, III
Michael J. Shortley, III

Attorney for Global Crossing
Telecommunications, Inc.

1080 Pittsford-Victor Road
Pittsford, New York 14534
Tel: 585.255.1429
Fax: 585.381.6781

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35 *Id.* at 30-31.

Certificate of Service

I hereby certify that, on this 12th day of December, 2005, copies of the foregoing Reply Comments of Global Crossing Telecommunications, Inc. were served by first-class mail, postage prepaid, upon the parties on the attached service list.

/s/ Michael J. Shortley, III
Michael J. Shortley, III

SERVICE LIST

Timothy M. Boucher
607 14th St., NW, Ste. 950
Washington, DC 20005

Attorneys for Quest Communications International Inc.

Karen Brinkman
Latham & Watkins LLP
555 – 11th St., NW, Ste. 1000
Washington, DC 2004-1304

Attorneys for ACS of Alaska

David L. Sieradzki
Hogan & Hartson LLP
555 – 13th St., NW
Washington, DC 20004

Attorneys for WilTel Communications LLC

Jeffrey S. Lanning
607 14th St., NW, Ste. 400
Washington, DC 20554-2164

Attorneys for United States Telecom Association

Theodore R. Kingsley
675 W Peachtree St., NE, Ste. 4300
Atlanta, GA 30375-0001

Attorneys for BellSouth Corporation

Karen Brinkmann
Latham & Watkins LLP
555 – 11th St., NW, Ste. 1000
Washington, DC 20004-1304

Attorneys for CenturyTel, Inc.

Harry N. Malone
Swidler Berlin LLP
3000 K St., NW, Ste. 300
Washington, DC 20007-5114

Attorneys for Broadwing Communications, LLC

Harry N. Malone
Swidler Berlin LLP
3000 K St., NW, Ste. 300
Washington, DC 20007-5114

Attorneys for Level 3 Communications, Inc.

Leslie V. Owsley
1515 N Courthouse Rd., Ste. 500
Arlington, VA 22201-2909

Attorneys for Verizon

Douglas E. Hart
Frost Brown Todd LLC
2200 PNC Ctr., 201 E Fifth St.
Cincinnati, OH 45202

Attorneys for Cincinnati Bell Telephone Company LLC

Richard Rindler
Swidler Berlin
3000 K. St., NW, Ste. 300
Washington, DC 20007-5116

Attorneys for Pac-West Telecom, Inc.
Donna N. Lampert
Lampert & O'Connor, P.C.
1750 K St., NW, Ste. 600
Washington, DC 20006

Attorneys for EarthLink, Inc.

Colin S. Stretch
Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C.
1615 M. St., NW, Ste. 400
Washington, DC 20036-3209

Attorneys for SBC Communications Inc.

Robert A. Bye
8829 Bond St.
Overland Park, KS 66214

Attorneys for Cinergy Communications Company

Christopher Wright
Harris, Wiltshire & Grannis LLP
1200 18th St., NW, 12th Fl.
Washington, DC 20036

Attorneys for Point One

Gregg C. Sayre
180 S Clinton Ave., 7th Fl.
Rochester, NY 14646-0700

Attorneys for Frontier Communications

Corporate Counsel
80 S Jefferson Rd.
Whippany, NJ 07981

Attorneys for ITTA, NECA, NTCA, OPASTCO, US Telecom & WTA

Edward A. Yorkgitis, Jr.
Kelley Drye & Warren LLP
1200 19th St., NW, Ste. 500
Washington, DC 20036

Attorneys for NuVox Communications, XO Communications, Xspedius Communications, Inc.

W. Scott McCollough
1250 Capital of Texas Highway South
Bldg. 2, Ste. 235
Austin, TX 78746

Attorneys for UTEX Communications Corporation

Emmanuel Staurulakis
John Staurulakis, Inc.
7852 Walker Dr., Ste. 200
Greenbelt, MD 20770

Attorneys for John Staurulakis, Inc.

Cesar Caballero
One Allied Dr.
Little Rock, AR 72202

Attorneys for Alltel Corporation

David C. Bergmann
10 W. Broad St., Ste. 1800
Columbus, OH 43215-3485

Attorneys for National Association of State Utility Consumer Advocates

Corporate Counsel
31 Clinton St., 11th Fl.
PO Box 46005
Newark, NJ 07101

Attorneys for New Jersey Division of the Ratepayer Advocate

Steven H. Thomas
McGuire, Craddock & Strother, P.C.
500 N. Akard, Ste. 3550
Dallas, TX 75201

Attorneys for Marlene H. Dortch

Eric Einhorn
1401 I St., NW, Ste. 1100
Washington, DC 20005

Attorneys for SBC

Jennifer McKee
FCC
Pricing Policy Div.
445 12th Street, SW
Washington, DC 20554

Attorneys for FCC

Colin S. Stretch
Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C.
Summer Sq.
1615 M St., NW, Ste. 400
Washington, DC 20036

Attorneys for SBC ILEC's

Michael G. Hoffman
1600 Viceroy
Dallas, TX 75235

Attorneys for VarTec Telecom, Inc.